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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

v.

WILLIAM DUNN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MOTION OF THE CENTER FOR CLAIMS RESOLUTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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MOTION OF THE CENTER FOR CLAIMS RESOLUTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* SUPPORTING PETITIONER

The Center For Claims Resolution (the "Center") moves for leave to file the attached brief as *amicus curiae* in support of the Petition for a Writ of Certiorari filed by Owens-Corning Fiberglas Corporation ("Owens-Corning"),

pursuant to Rule 37 of the Rules of the Supreme Court of the United States.[1]

The Center is a non-stock, not-for-profit corporation representing 20 companies that are defendants in asbestos personal injury litigation.[2] The Center was formed in October 1988 to deal with the unprecedented explosion in asbestos-related litigation. It represents its members in personal injury cases on a consolidated basis, thereby reducing litigation costs and facilitating settlement. The Center's goal is to resolve claims for fair value. Thus, to date the Center has resolved -- through settlement, dismissal, and, in some cases, trial -- approximately 135,000 personal injury claims.

As of the date of this brief, approximately 58,000 cases were pending against the Center's members, virtually all of which include claims for punitive damages. All of these suits seek to punish the same conduct, because each is predicated on allegations that the particular Center member knew of the potential hazards of asbestos but failed to warn of them. Awards of such damages in the past have helped drive other defendants into bankruptcy, thus placing an increasing liability share on remaining defendants. The threat of punitive damages in every case, moreover, greatly

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[1] Petitioner Owens-Corning Fiberglas has consented to the filing of this brief. Counsel for respondent William Dunn, Joel H. Holt, declined to consent.

[2] The companies in the Center are Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; Asbestos Claims Management Corp. (formerly National Gypsum Company); CertainTeed Corp.; C.E. Thurston and Sons, Inc.; Dana Corp.; Ferodo America, Inc. (formerly Nuturn Corp.); Flexitallic, Inc.; GAF Corp.; I.U. North America, Inc.; Maremont Corp.; National Service Industries, Inc.; Nosroc Corp.; Pfizer, Inc.; Quigley Co. Inc.; Shook & Fletcher Insulation Co.; T&N plc; Union Carbide Chemicals and Plastic Company, Inc.; and United States Gypsum Co.

inflates the amounts plaintiffs seek in settlement, and makes settlement difficult or impossible in many cases. Accordingly, the Center has a fundamental interest in the question presented here, namely whether the Due Process Clause imposes a limitation on repetitive punitive damages awarded in multiple actions for a single wrongful course of conduct by one defendant.

In addition, the Center's nationwide litigation experience on behalf of numerous companies gives it a perspective on the punitive damages issue that may prove useful to this Court. Last, the Center presents arguments supplementary to those advanced by petitioner Owens-Corning. In particular, the Center's brief describes the growing use of multipliers to assess punitive damages in mass tort litigation and explains how the use of punitive damages multipliers in consolidated cases can readily lead to potentially enormous awards of punitive damages that can cripple, if not destroy, the targeted defendant.

In sum, the Center has a vital and significant stake in the question presented here and the extent and diversity of

its experience may be of assistance to the Court. Accordingly, we respectfully request this Court to grant this motion for leave to file the attached brief.

Respectfully submitted,

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BRIEF FOR THE CENTER FOR CLAIMS RESOLUTION AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF *AMICUS CURIAE*

The Center for Claims Resolution (the "Center") is a non-stock, not-for-profit corporation representing 20 companies that are defendants in asbestos personal injury litigation.[1] The Center was formed in October 1988 to deal

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[1] The companies in the Center are Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; Asbestos Claims (continued...)

with the unprecedented explosion in asbestos-related litigation. It represents its members in personal injury cases on a consolidated basis, thereby reducing litigation costs and facilitating settlement. The Center's goal is to resolve claims for fair value. Thus, to date the Center has resolved -- through settlement, dismissal, and, in some cases, trial -- approximately 135,000 personal injury claims.

As of the date of this brief, approximately 58,000 cases were pending against the Center's members, virtually all of which include claims for punitive damages. In essence, each punitive damages claim made against a Center member seeks to punish it for the same conduct, because each claim is predicated on allegations that the particular Center member knew of the potential harms of asbestos but failed to warn of them. The Center expects that almost all future litigation against its members will likewise seek punitive damages. Awards of such damages in the past have helped drive other asbestos defendants into bankruptcy, thus placing an increasing liability share on remaining defendants. The threat of punitive damages in every case, moreover, greatly inflates the amounts plaintiffs seek in settlement, and makes settlement difficult or impossible in many cases. For these reasons, the Center has a vital interest in the question presented here, namely whether the Due Process Clause imposes a limitation on repetitive punitive damages awarded in multiple actions for a single wrongful course of conduct by one defendant. Moreover, the Center's nationwide litigation

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[1] (...continued)
Management Corp. (formerly National Gypsum Company); CertainTeed Corp.; C.E. Thurston and Sons, Inc.; Dana Corp.; Ferodo America, Inc. (formerly Nuturn Corp.); Flexitallic, Inc.; GAF Corp.; I.U. North America, Inc.; Maremont Corp.; National Service Industries, Inc.; Nosroc Corp.; Pfizer, Inc.; Quigley Co. Inc.; Shook & Fletcher Insulation Co.; T&N plc; Union Carbide Chemicals and Plastic Company, Inc.; and United States Gypsum Co.

experience on behalf of many defendants gives it a perspective on this punitive damages issue that may prove useful to the Court.[2]

SUMMARY OF ARGUMENT

This Court has recognized that the Due Process clause imposes substantive limitations "beyond which penalties may not go." *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2718 (1993) (plurality opinion) (citation omitted). In prior cases, this Court has reviewed whether the amount of punitive damages awarded to one claimant, who was the sole victim of defendant's wrongful conduct, was reasonable. This petition presents a wholly different question: whether multiple awards of punitive damages in mass tort litigation against one defendant for the same course of conduct violate the Due Process Clause of the Fourteenth Amendment.

The excessiveness of multiple punitive damages awards is of particular concern in mass tort litigation. This litigation is the result of a national market for mass-produced products. Whenever a product distributed nationwide is found to have injured some users, the likely result is thousands of products liability actions brought in state and federal forums by users allegedly harmed by the product, seeking compensatory and punitive damages against the defendant manufacturer of the product for its negligent design and/or manufacture of that product. Traditional procedures for reviewing the rationality of a punitive damages award have proven wholly insufficient to protect

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[2] Petitioner Owens-Corning Fiberglas has consented to the filing of this brief. Because counsel for respondent refused to consent, the Center submits herewith a motion for leave to file this *amicus* brief in support of petitioner.

defendants in mass tort litigation from multiple punitive damages awards which far exceed the amount needed to punish and deter the conduct found to be harmful.

Although lower courts have recognized the serious due process concerns raised by multiple awards of punitive damages in mass tort litigation nationwide, none of these courts have attempted to resolve this problem. This Court should take this opportunity to address this issue and provide the lower courts with a framework for evaluating whether multiple punitive damages awards punish a defendant repeatedly and without limitation for a single course of conduct in violation of the Due Process clause.

ARGUMENT

I. THE DUE PROCESS STANDARD FOR DETERMINING EXCESSIVENESS SHOULD INCLUDE CONSIDERATION OF ANY PRIOR PUNITIVE DAMAGES ASSESSED AGAINST A DEFENDANT FOR THE SAME CONDUCT

This Court has instructed that punitive damages serve a twofold purpose -- to punish and deter a particular course of wrongful conduct. *E.g.*, *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1, 22 (1991); *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). Punitive damages are a "windfall to a fully compensated plaintiff" and are, by design, not intended to compensate the plaintiff. *E.g.*, *Newport* 453 U.S. at 267; *IBEW* v. *Foust*, 442 U.S. 42, 50 (1979).

This Court has recently confirmed that punitive damages must be "reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Haslip*, 499 U.S. at 21. This Court has made clear that punitive awards may violate substantive due

process if the punitive damages assessed are excessive. See *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2718-19 (1993) (plurality opinion); *id.* at 2731 (O'Connor, J., dissenting).

In *Haslip* and in *TXO*, where the defendant's wrongful conduct affected only the plaintiff, this Court assessed whether the ratio of punitive damages to compensatory damages in the individual action was constitutionally permissible. This petition raises a different question: whether repetitive punitive damages awarded against the same defendant for the same conduct are grossly excessive and thus unconstitutional. This question arises with frequency in increasingly prevalent mass tort litigation where thousands of claimants bring suit against a small number of defendant manufacturers seeking compensatory and punitive damages on the grounds that the defendant manufacturers negligently designed and/or manufactured a product and/or failed to warn of its hazards. In this context, the punitive damages awarded in a given case may bear a reasonable relationship to the compensatory damages in that case but, when aggregated with punitive damages awarded in other cases for the same conduct, may not be rationally related to the constitutionally permissible goals of punishment and deterrence.

For some time, lower courts have recognized that multiple punitive damages awards in the mass tort context could present excessiveness problems, but none have attempted to tackle this issue.[3] As we show below, repeated and excessive punitive damages awards are a looming threat to defendants involved in mass tort litigation. This Court should grant certiorari to establish substantive due process limitations on the aggregate amount of punitive damages that can be awarded in mass tort litigation.

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[3] See cases cited at note 23, *infra*.

A. Mass Tort Litigation Presents Unique Problems

Because of our national market, mass-produced goods are distributed to millions of users. An allegedly defective product often leads numerous users to bring suit against the product manufacturer seeking compensatory and punitive damages for allegedly defective design and/or manufacture of the product. When liability is found, each jury often awards damages to an individual plaintiff in a vacuum. In most cases, it has no knowledge of any prior compensatory and/or punitive damages that may already have been awarded against the defendant for the same conduct, much less the aggregate amount of such awards. Thus, multiple individual claims for punitive damages create a significant potential for aggregate punitive awards against a defendant for the same act or conduct far in excess of the amount reasonably necessary to punish or deter the offending act or conduct.[4]

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[4] See, *e.g.*, *Asbestos Litigation Crisis in Federal and State Courts: Oversight Hearing Before the Subcomm. on Intellectual Property and Judicial Admin. of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992) [hereinafter *Hearing*] (statement of Hon. William W. Schwarzer, at 17); Report of the [U.S.] Judicial Conference Ad Hoc Committee on Asbestos Litigation, at 32-33 (Mar. 1991) [hereinafter Judicial Conference Report]; Dennis N. Jones *et al.*, *Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process*, 43 Ala. L. Rev. 1, 1-2 (1991) [hereinafter Jones *et al.*]; Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice, American College of Trial Lawyers, at 20-26 (Mar. 3, 1989); John C. Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 147 (1986); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L. Rev. 37 (1983); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 50 (1982).

Asbestos products liability litigation is, of course, the leading example of mass tort litigation. By June 30, 1991, over 71,000 cases had been filed nationwide in the federal courts against various asbestos miners and product manufacturers.[5] Soon thereafter, the Judicial Panel on Multidistrict Litigation transferred the approximately 26,000 then-pending asbestos actions to the Eastern District of Pennsylvania for coordinated or consolidated pre-trial proceedings.[6] Since then, the total of cases transferred to the multidistrict proceeding has risen to nearly 40,000.[7] Moreover, state courts are likewise burdened by the onslaught of asbestos litigation -- at least 70,000, and perhaps as many as 129,000, asbestos cases were pending in various state courts as of mid-1992.[8] New claims continue to be filed nationwide against Center members alone at a rate of approximately 2,000 per month.

These claims all seek to punish the same alleged misconduct -- that the defendants allegedly knew or should have known of a possible link between asbestos and health hazards, but did not warn users of such dangers. In the asbestos litigation as a whole, as with petitioner Owens-Corning in particular, the aggregate compensatory damages awarded to a multitude of claimants punish the defendant for its wrongful conduct. *Cf. Smith* v. *Wade*, 461 U.S. 30, 94

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[5] *Hearing*, *supra* note 4 (statement of Hon. William W. Schwarzer, at 36).

[6] *In re Asbestos Prods. Liab. Litig. (No. VI) (MDL No. 875)*, 771 F. Supp. 415 (J.P.M.L. 1991).

[7] Asbestos Litigation Reporter (Andrews) (Sept. 17, 1993) at 28,328.

[8] State Judges Asbestos Litigation Committee, *Megatorts: The Lessons of Asbestos Litigation*, at 1 (July 21, 1992), *reprinted in* Mealey's Litig. Rep. -- Asbestos (Nov. 20, 1992) at B-1.

(1983) (O'Connor, J., dissenting). Nevertheless, multiple punitive damages totalling millions of dollars have been assessed repeatedly against a number of defendants as punishment for alleged misconduct with respect to asbestos warnings.

The excessiveness of these multiple punitive damages awards is quite apparent in the asbestos context because these damages are imposed decades after the allegedly wrongful conduct was stopped, on officers who did not participate in such conduct and shareholders who did not benefit from it. Moreover, the combined size of such punitive awards,[9] when added to the millions of dollars of

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[9] A brief review of published data shows that, even as early as 1982, punitive damages awards in asbestos cases had become staggering. A survey published in Asbestos Litigation Reporter (Andrews) that was included in an appendix to the opinion in *Jackson* v. *Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985), showed that, by the end of 1982, in trials of 147 asbestos cases, a total of $39.47 million in punitive damages had been awarded to 21 plaintiffs. *Id.* at 1338 & n.37. Similarly, at the time it filed for Chapter 11 reorganization in 1982, the Manville Corporation reported that ten punitive damages verdicts had been returned against it, averaging $616,000 each, for a total of $6.16 million. *Id.* at 1339 & n.40. In addition, a study by the Rand Corporation in 1984 reported that, in the period from January 1, 1980 through August 26, 1982, 19 plaintiffs received a total of $4.93 million in punitive damages awards. *Id.* at 1338-39.

In more recent years, punitive damages awards have grown even higher. For example, in November 1987, six Delaware plaintiffs were awarded $75 million in punitive damages against asbestos defendant Raymark Industries, Inc., which shortly thereafter went into bankruptcy. *George* v. *AC&S, Inc.*, No. 82C-MR71 (Del. Super. Ct., New Castle County, Nov. 9, 1987), *reported in* Asbestos Litig. Rep. (Andrews) (Nov. 20, 1987) at 16,100. Further, in 1990, shortly before filing for bankruptcy protection, the Celotex Corporation stated in affidavits that, between September 1988 and March 1989, over $10 million had been awarded against it for punitive damages, compared to $15 million in judgments for compensatory damages during the same period. *Edwards* v. *Armstrong World Indus., Inc.*, 911 F.2d 1151, 1155 (5th Cir. 1990).

compensatory damages awards, may far exceed the total profits earned by asbestos producers from sales of their allegedly defective asbestos-containing products. Such is the experience of petitioner in the instant case.[10] Indeed, the magnitude of these awards has helped to drive many asbestos producers into bankruptcy,[11] threatening to deprive future plaintiffs of compensatory damages.[12] Present claimants who have been fully compensated for their injuries should not be permitted to receive windfall punitive damages at the expense of future claimants who may then be pre-

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[10] In this case, the total sales by petitioner Owens-Corning of its asbestos product Kaylo amounted to approximately $140 million, and its profits did not exceed $7.7 million. To date, Owens-Corning has resolved more that 101,000 asbestos personal injury claims (for more than $1 billion in indemnity costs) and it expects to pay $1 billion of its own funds to cover the uninsured costs of pending and future asbestos personal injury claims through 1999. Owens-Corning Petition for a Writ of Certiorari at 16-17. Thus, petitioner's uninsured liability dwarfs the modest profits it earned from sales of its asbestos product. On top of this, $56 million in punitive damages have been awarded against Owens-Corning -- more than seven times its total profit on Kaylo.

[11] Since the commencement of this litigation in the mid-1970s, at least fifteen asbestos manufacturers have filed for protection under the U.S. bankruptcy laws, including Amatex, Brunswick Fabricators, Carey-Canada, Celotex, Eagle-Picher Industries, Forty-Eight Insulations, H.K. Porter, Hillsborough, Manville, Nicolet, North America Asbestos, Pacor, Raymark Industries, Standard Insulation and Unarco (as well as its parent company UNR Industries). Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383, 390 & n.13 (1993).

[12] Lower courts have recognized the real danger that the assets of asbestos defendants will be exhausted by multiple punitive damages awards and these defendants will be unable to pay compensatory damages to future claimants for their asbestos-related injuries. See *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 751 (E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *on rehearing*, 993 F.2d 7 (2d Cir. 1993); *Abate* v. *ACandS, Inc.*, No. 89236704, slip. op. at 23-25 (Md. Cir. Ct., Baltimore City, Dec. 9, 1992), *reprinted in* Asbestos Litig. Rep. (Andrews) (Dec. 18, 1992) at 26650, 26661-62.

cluded from obtaining compensation for their injuries. These multiple awards are overkill and cannot be justified on either punishment or deterrence grounds.

An example of the gross excessiveness of multiple punitive damages awards can be seen in asbestos cases where punitive damages are assessed by a "multiplier" method. *E.g.*, *Cimino* v. *Raymark Indus., Inc.*, 751 F. Supp. 649 (E.D. Tex. 1990). Under this approach, punitive damages are tried in "common issue," consolidated trials involving hundreds or possibly thousands of claimants, with the jury determining a punitive damages "multiplier" for each defendant. Then, once compensatory damages are assessed as to each individual claimant, the punitive damages awarded to that claimant are calculated by multiplying the defendant's share of the claimant's compensatory award by the punitive damages "multiplier." The use of punitive damages multipliers in consolidated cases, such as *Cimino*, can readily lead to awards of punitive damages totaling hundreds of millions of dollars.[13] And *Cimino* is not the

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[13] *Cimino* included a consolidated trial of the defendants' punitive damages liability to 2,298 plaintiffs. 751 F. Supp. at 657-58. Two of the original four defendants (Celotex and Carey-Canada) have filed for bankruptcy and a third (Fibreboard) has settled. See Asbestos Litig. Rep. (Andrews) (Oct. 16, 1992) at 26,227. The remaining defendant, Pittsburg-Corning, was assessed a punitive damages multiplier of 3.0. 751 F. Supp. at 657-58. If one assumes hypothetically that this company has a 10% share of compensatory damages (751 F. Supp. at 654, *as modified*, Memorandum Opinion and Order Granting In Part Pittsburg Corning Corporation's Motion to Modify Judgments of March 9, 1993, *reprinted in* Mealey's Litig. Rep. -- Asbestos (Apr. 2, 1993) at B-1), and the average punitive damages award against Pittsburg-Corning is $500,000 (which is less than the average awarded by the *Cimino* jury in 160 sample cases, see Order of Nov. 12, 1990, *Cimino* v. *Raymark Indus., Inc.*, No. B-86-0456-CA (E.D. Tex. Nov. 12, 1990), *reprinted in* Asbestos Litig. Rep. (Andrews) (Nov. 16, 1990) at 22,039-48), then the average punitive damages award against Pittsburg-Corning would be $150,000 in each case ($500,000 x 10% x 3). Totaled over 2,298

(continued...)

only litigation where such punitive damage multipliers have been awarded in consolidated trials of hundreds or thousands of claims.[14] Few, if any, companies could survive

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[13] (...continued)
cases, the multiplier might lead to aggregate punitive damages in excess of $344 million assessed against only one defendant in this one consolidated trial in one jurisdiction.

[14] In Mississippi, in the largest consolidated asbestos trial to date involving 9,600 plaintiffs, the Jackson County Circuit Court held a two-stage "common" issues trial for six sample plaintiffs which concluded in awards totalling $9.2 million in compensatory damages against three defendants, and a punitive multiplier of .10 against each defendant. The multiplier will be applied to all of the remaining cases consolidated before the Jackson County Circuit Court, estimated to be between 6,900 and nearly 10,000. *In re Asbestos Personal Injury Cases; Abrams et al.*, Nos. 88-5422(2), *et al.*, (Jackson County Cir. Ct., Miss.), *reported in* Asbestos Litig. Rep. (Andrews) (Aug. 20, 1993) at 28,112-13. For the six plaintiffs for whom compensatory damages have already been awarded, the .10 multiplier will generate additional punitive damages awards totalling $926,000 against the three liable defendants.

In Maryland, a Circuit Court consolidated over 8,500 cases from across the state and held a "common" issues trial resulting in the award of punitive damages multipliers ranging from .35 to 2.5 against several defendants. In the first six "sample" cases tried, compensatory damages totalling $9.6 million were awarded against six defendants while four defendants were hit with more than $7.2 million in punitive damages. Order Entering Final Judgments, *Abate* v. *ACandS, Inc.*, No. 89236704 (Md. Cir. Ct., Baltimore City, Dec. 9, 1992) at 10-11, 13-17, *reprinted in* Asbestos Litig. Rep. (Andrews) (Dec. 18, 1992) at 26,650, 26,655, 26,656-58. As discussed in note 22 *infra*, the court in this action, however, has deferred entering the judgments for punitive damages.

In West Virginia, the Kanawha County Circuit Court in 1989 held a consolidated trial in which punitive damages against three defendants were awarded to 315 claimants by a punitive mutiplier of 3. *In re Asbestos Cases*, No. 84-C-3321 *et al.* (W. Va. Cir. Ct., Kanawha County, May 26, 1989), *reported in* Asbestos Litig. Rep. (Andrews) (June 2, 1989) at 19,093. Since then, other West Virginia courts have ordered similar consolidated trials in (continued...)

even one award of punitive damages totaling hundreds of millions of dollars, much less multiple awards in multiple jurisdictions.

The imposition of punitive damages based on even a seemingly modest multiplier of compensatory damages can thus lead, in the mass tort context, to multiple punitive damages awards against a defendant for the same course of conduct that, in the aggregate, are unquestionably excessive. And these mass-consolidated cases represent a small fraction of the asbestos personal injury cases pending nationwide in which a typical asbestos defendant would be participating.

The asbestos products liability litigation is not unique. Mass tort litigation has arisen over many products distributed nationwide. Examples include litigation involving silicone gel breast implants;[15] DES, a prescription drug

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[14] (...continued)
which the jury would be asked to determine punitive damages multipliers. For example, such a consolidation was ordered of 533 claims in *In re Asbestos Cases (Individuals)*, Civil Action Nos.: All Pending Cases (W.Va. Cir. Ct., Monongahela County, Sept. 13, 1991). These cases settled, however, after the West Virginia Supreme Court of Appeals denied a writ of prohibition filed on behalf of the Center's members.

[15] A 1992 report estimated that two million women have received breast implants. See Stephen Lichtenstein, *A Discussion of the Silicone Gel-Filled Breast Implant Controversy*, 12 Rev. Litig. 205, 206 (1992). The major manufacturers of breast implants have proposed to settle all present and future claims of women who received their implants. However, no global settlement has yet been reached, and, if such a class action settlement is reached, claimants will still be permitted to opt-out of it. David R. Olmos, "Settlement Talks Falter in Breast Implant Case," *Los Angeles Times* (Nov. 15, 1993) at D2.

prescribed to prevent miscarriages;[16] lead-based paint;[17] and repetitive stress injuries.[18] The numerous claims filed with respect to each product generally allege that it was defective in design or that there was a failure to warn, and it appears that most actions have sought punitive damages as well as compensatory damages. As with asbestos product liability litigation, there is a virtual certainty in the mass tort setting that the punitive damages sought by thousands of claimants against the product manufacturer will punish that

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[16] Approximately 1,000 suits were filed against the manufacturers by women who took the drug and children who were affected by it. Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 920 (1989) [hereinafter Wheeler]. Recently, grandchildren of women who took DES have begun filing suit, creating the potential for a new wave of litigation. John B. Maynard, Note, *Third-Generation-DES Claims*, 27 New Eng. L. Rev. 241, 241-42 (1992).

[17] Class actions and individual suits have increased in recent years against the eight manufacturers who produced virtually all of the lead pigment used in paint in the U.S., spurring comparisons to mass asbestos litigation. Julie Gannon Shoop, *Class Actions Add Momentum to Lead Paint Litigation*, 28 Trial 11, 12, 14 (Apr. 1992). New York State officials have expressed concern that the number of products liability actions involving exposure to lead paint is mushrooming and that these actions are fast replacing asbestos as the "toxic tort (lawsuit) king." Matt Gryta, "2 Area Families Sue for $26 Million over Lead-based Paint; 8 Companies, Trade Group Named," *The Buffalo News* (Nov. 9, 1993).

[18] It has been estimated that 14 to 18 million American workers suffer repetitive stress injuries every year. Thus far, over 450 claimants have filed suit nationwide. More than 160 of these actions have been consolidated in the Eastern District of New York. Attorneys seeking to consolidate the remaining cases in the Eastern District of New York have stated their intention to file another 1,500 cases. This litigation "explosion" has been compared to that which hit the asbestos industry in the late 1970s and 1980s. Lawrence Chesler, *Repetitive Motion Injury and Cumulative Trauma Disorder: The Wave of Products Liability Arrives*, 10 Computer Lawyer 21, 24-25 (May 1993).

defendant repeatedly and without limitation for the same course of conduct.

In this case, the substantial compensatory and punitive damages assessed against petitioner Owens-Corning in numerous other cases have been fully adequate to serve the goals of punishment and deterrence. This Court should grant certiorari here to consider whether the award of additional punitive damages against petitioner Owens-Corning violates the Due Process Clause because such damages are no longer needed to further these goals.

B. This Court Should Grant the Petition to Consider Adoption of an Excessiveness Standard That Limits Multiple Punitive Awards for the Same Conduct

As we have shown, a seemingly reasonable relationship between the punitive damages and the compensatory damages awarded in a single case provides no basis for determining in the mass tort context whether a defendant has been punished repeatedly and unfairly for the same course of conduct. Absent limitation, multiple awards of punitive damages against a single defendant in the mass tort setting offend the requirement of fundamental fairness imposed by the Due Process Clause.

At present, there is no mechanism to control the aggregate level of multiple punitive damages awards. In each individual case, a jury awards punitive damages against a defendant for its wrongful conduct that affected an entire class of injured parties without sufficient knowledge of prior

punitive awards imposed to punish the same conduct.[19] The punitive damages award in even one of these actions might well constitute a sufficient punishment and deterrent for the conduct that gave rise to all of the litigation.[20]

The aggregation of multiple punitive awards in separate actions involving the same conduct results "in windfall awards to individual plaintiffs at the expense of a disproportionately punished defendant."[21] Further, multiple awards of punitive damages to plaintiffs involved in mass tort litigation jeopardize the defendant's ability to pay compensatory damages for future plaintiffs and eventually may cause the defendant to go into bankruptcy, injuring

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[19] It is no answer to suggest that the jury should be instructed on the amounts of prior punitive damages awards. Any such instruction is more likely to prejudice than to protect a defendant. See *Juzwin* v. *Amtorg Trading Corp.*, 705 F. Supp. 1053, 1056 & n.1, *modified*, 718 F. Supp. 1233 (D.N.J. 1989). See also Jones *et al.*, *supra* note 4, at 29-30 ("if presented to a jury, evidence of prior awards imposed for the same conduct could do the defendant more harm than good").

[20] Indeed, the recent use of a multiplier to set punitive damages in asbestos cases raises substantial due process concerns because the jury determining the multiplier cannot ascertain the size of the ultimate punitive damages award for all claimants in the consolidated proceeding or the impact that the total amount of the award will have on the defendant. Use of a multiplier does not allow for the "meaningful individualized assessment of appropriate deterrence and retribution," *Haslip*, 499 U.S. at 20, necessary to satisfy due process.

[21] *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 889 (N.D. Cal. 1981), *rev'd on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

shareholders, employees, customers, and creditors who had no part in or knowledge of the wrongful conduct.[22]

The lower courts that have considered this issue have recognized the substantial due process concerns associated with unlimited multiple punitive damages awards against a defendant for the same course of conduct.[23] However,

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[22] The Director of the Federal Judicial Center, Judge William W. Schwarzer, recently observed:

> "Punitive damages compete with compensatory damages for the increasingly scarce resources of asbestos defendants and their insurers. Until the claims of future claimants become liquidated, distribution of punitive damages to current claimants creates a risk of exhausting funds before potential claimants discover their injuries."

Hearing, *supra* note 4 (statement of Hon. William W. Schwarzer, at 13).

Similarly, the Judicial Conference Report, *supra* note 4, at 32, stated: "[M]ultiple judgments for punitive damages in the mass tort context against a finite number of defendants with limited assets threaten fair compensation to pending claimants and future claimants who await their recovery, and threaten the economic viability of the defendants."

The risk of "asset depletion" led Judge Marshall A. Levin of the Maryland Circuit Court of Baltimore City to defer payment of any punitive damages award until all approximately 8,500 plaintiffs in the Baltimore City asbestos litigation received their compensatory awards. *Abate* v. *ACandS, Inc.*, *supra* note 14.

[23] See, *e.g.*, *King* v. *Armstrong World Indus., Inc.*, 906 F.2d 1022, 1032-33 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2236 (1991); *McBride* v. *General Motors Corp.*, 737 F. Supp. 1563, 1570 (M.D. Ga. 1990); *Johnson* v. *Celotex Corp.*, 899 F.2d 1281, 1287-88 (2d Cir.), *cert denied*, 111 S. Ct. 297 (1990); *Racich* v. *Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989); *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967); *In re School Asbestos Litig.*, 789 F.2d 996, 1004-05 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986); *Juzwin* v. *Amtorg Trading Corp.*, 705 F. Supp. at 1060-64, *modified*,

(continued...)

most of these courts have avoided confronting this issue. Some have disposed of the case on narrow technical grounds.[24] Others have recognized that their limited powers preclude them from adopting a national, unified approach to the question of repetitive punitive damages in mass tort litigation.[25] Moreover, the absence of an accepted due process standard makes it more difficult for any individual court to restrain punitive damages simply because other courts have already awarded them.[26] This Court is not constrained by these jurisdictional limitations, and should grant certiorari to adopt a standard for determining whether repetitive punitive damages awarded against one defendant for a single course of conduct in mass tort litigation nationwide are excessive.

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[23] (...continued)
718 F. Supp. at 1234-36; *Leonen* v. *Johns-Manville Corp.*, 717 F. Supp. 272, 282-83 (D.N.J. 1989); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983), *mandamus denied sub nom. In re Diamond Shamrock Chems. Co.*, 725 F.2d 858, 862 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984); *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. at 899. See also *United States Mineral Prods. Co.* v. *Waters*, 610 So. 2d 20, 23 (Fla. Dist. Ct. App. 1992), where a panel of the Florida District Court of Appeals *sua sponte* certified to the Florida Supreme Court the issue of whether multiple punitive damages awards for a single course of conduct are permissible, describing the issue as "of great public importance."

[24] See, *e.g.*, *Johnson* v. *Celotex Corp.*, 899 F.2d at 1287-88 (inadequate record); *Racich* v. *Celotex Corp.*, 887 F.2d at 398 (same).

[25] See, *e.g.*, *King* v. *Armstrong World Indus., Inc.*, 906 F.2d at 1033; *Juzwin* v. *Amtorg Trading Corp.*, 718 F. Supp. at 1235.

[26] See *Dunn* v. *HOVIC*, 1 F.3d 1371, 1387 (3d Cir. 1993), *petition for cert. filed* (U.S. Oct. 25, 1993); *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d at 840.

CONCLUSION

For the reasons stated in the Petition for a Writ of Certiorari, and in this *amicus* brief, this Court should grant the petition for a writ of certiorari.

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